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Are UK Courts UK Courts or Community Courts?

*"Even though the Treaty of Rome has been signed, it has no effect, so far as these courts are concerned, until it is made an Act of Parliament. Once it is implemented by an Act of Parliament, these courts must go by the Act of Parliament, and then only to the extent that Parliament tells us."*¹

*"The Treaty of Rome is the supreme law of this country, taking precedence over Acts of Parliament. Our entry to the Community meant that (subject to our undoubted, but probably theoretical right to withdraw from the Community altogether) Parliament surrendered its sovereign right to legislate contrary to the provisions of the Treaty on the matters of social and economic policy which the Treaty regulated"*²

"However intellectually stimulating and politically and academically interesting speculation about the loss of Sovereignty or otherwise may be, the reality is that the European Communities Act affirms the existence of an ultimate rule of recognition for the EEC and at the end of the day, the real test of this is the attitude of the courts, officials and private persons in the UK"

*"The question is whether judicial review is available for the purpose of securing a declaration that certain United Kingdom primary legislation is incompatible with Community law. [...] A declaration that the threshold provisions of the 1978 Act are incompatible with Community law would suffice for the purpose sought to be achieved by the EOC and is capable of being granted consistently with the precedent afforded by Factortame"*⁴

Are UK Courts UK courts or Community Courts?

This chapter addresses the following questions: why are UK Courts involved in the protection of Community rights? What role do they assume when enforcing Community rights? Where does the duty come from: the European Communities Act 1972 or the recognition that Community law is 'a new legal order'?

2.1 Community Law as a new and distinct legal order

Soon after the EEC Treaty came into force, the ECJ had to examine the relationship between the new legal order and the national legal orders. In so doing, it denied the Member States the classic sovereign right – recognised in public international law – to determine the method by which and the extent to which an international treaty can penetrate their legal systems. The Court emphasised both the autonomy of Community law and its uniqueness and specificity. Community law is not an extension of national law, nor can it be equated with public international law.

"The objective of the EEC Treaty, which is to establish a Common Market, the functioning of which is of direct concern to interested parties in the Community,

implies that this Treaty is more than an agreement which merely creates mutual obligations between the contracting States.... the Community constitutes a new legal order of international law for the benefit of which the States have limited their sovereign rights, albeit within limited fields... independently of the legislation of the Member States community law... not only imposes obligations on individuals but is also intended to confer upon them rights which become part of their legal heritage".

"By contrast with ordinary international treaties, the EEC Treaty has created its own legal system which, on the entry into force of the Treaty, became an integral part of the legal system of the Member States, and which their courts are bound to apply" ...The integration into laws of each Member State of provisions which derive from the Community, and more generally the terms and spirit of the Treaty, make it impossible for the States, as a corollary, to accord precedence to a unilateral and subsequent measure over a legal system accepted by them on a basis of reciprocity. [...] the law stemming from the Treaty, an independent source of law, could not, because of its special and original nature, be overridden by domestic provisions, however framed, without being deprived of its character as Community law and without the legal basis of the Community itself being called into question." ⁶

These leading cases – introducing what in the literature is referred to as the concepts of direct effect and primacy – regulate the relationship between the newly created legal order and the national legal orders. They also provide a striking illustration and application of the interpretative methods of the ECJ. The obligation on national courts to apply and give priority to Community law in the domestic legal order is a prerequisite to the proper functioning of the Community legal order. Without such an obligation, Community rules would lose their significance as, they would be subordinate and lack utility. In subsequent cases, the ECJ relied again on the special nature of Community law to explain to – and convince – national courts that no national provision, of whatever kind, could override Community law. In *Internationale Handelsgesellschaft*⁷, the Court reaffirmed the supremacy of Community law even in the face of "fundamental rights as formulated by the Constitution" of a Member State or the "principles of a national constitutional structure". By 1978, it was a logical and inescapable conclusion that:

"every national court must, in a case within its jurisdiction, apply Community law in its entirety and protect rights which the latter confers on individuals and must accordingly set aside any provision of national law which may conflict with it, whether prior or subsequent to the Community rule. Accordingly, any provision of a national system and any legislative, administrative or judicial practice which might impair the effectiveness of Community law by withholding from the national court having jurisdiction to apply such law to do everything that is necessary at the moment of its application to set aside national legislative provisions which might prevent

*Community rules from having full force and effect are incompatible with those requirements which are the very essence of Community law.*⁸

The power to set aside national provisions which conflict with Community law or hamper its immediate application cannot be reserved to a special court. In the UK, the significance of *Simmenthal* is that any court, whether supreme or at first instance, and whether a creature of statute or otherwise, has jurisdiction to apply Community law⁹, including the power to suspend the application of an Act of Parliament.

By declaring that certain provisions of Community law create rights for individuals, being rights one might expect national courts to protect, the ECJ placed the burden of ensuring the uniform and effective application of Community law on national courts. Each and every national court or tribunal is called upon to measure the compatibility of national legislation with Community law; "every national judge is considered to be a Community judge and is empowered to question the Community validity of national law"¹⁰. Essentially, the Community law element present in a given dispute confers power, rather than the position of a court or tribunal in a given hierarchy. In a very real sense, every court or tribunal is transformed, for these purposes, into a kind of constitutional court, irrespective of whether such a court already exists in the same jurisdiction. Every "judge" whether of high judicial office or at the bottom rung of the ladder becomes a constitutional judge with the power to review the conformity of any provisions of national law, *whatever its rank and nature*, with the Community 'constitution'. So, the Chairman of an Industrial Tribunal becomes a constitutional judge who can review the compatibility of sections of UK primary legislation with Community law¹¹. Community law changes the traditional distribution of responsibilities between the different levels of jurisdiction in the Member States. For example, in circumstances where a court of first instance, having sought a ruling from the ECJ, delivers its decision, this would be binding on superior courts within the domestic appellate structure, in so far as it is based on the ECJ ruling. Yet, all UK courts would have the right to seek another ruling on the same issue¹². Community law empowers each and every national judge, and in the UK as elsewhere, lower courts have proved to be the most prolific users and most loyal allies of the ECJ¹³. The implications of the Court jurisprudence are far-reaching. Each court or tribunal in the Member States is a guardian of the supremacy of Community law. Still, the logic of primacy has created numerous challenges for national courts. For national courts coming to terms with the requirements imposed by the ECJ is a step-by-step process, as these requirements themselves evolve as the Community legal system matures.

2.2 National courts are domestic courts

The ECJ is not concerned with the national arrangements by which a treaty can produce effects for individuals. The national perspective is obviously rather different. The domestic constitutional and institutional arrangements governing the reception of treaties can hardly be ignored by national courts. The regulation of the internal effect of rules of international law is determined by national law and not by national courts. Accordingly, Community law has effect in the UK because the UK Parliament has so enacted, and if Parliament were to change the law, then the courts would have to follow that will. The ECJ can only pronounce on the effect Community rules ought to have within the national systems, following its vision of what the Community legal order requires. It falls outside its jurisdiction to rule on the effect that Community law ought to have according to national law.

The principles of primacy and direct effect put in place the decentralised system of enforcement of Community law. Whereas enforcement by national courts is undoubtedly the strength of the Community legal system, as Member States are unlikely to defy their own courts, it is also a double-edged sword, as national courts may not always feel they are in a position to enforce Community law or abide by the Community requirements. In other words, whatever the ECJ may say about the desired effect of Community law in the national legal order, and whatever steps it may have taken to influence the workings of the national judicial systems, it remains the position that it must be accepted, applied and followed by national courts. National courts are therefore the lynchpin in the system. National courts, although entrusted by the ECJ to act as Community courts when enforcing Community obligations, are subject in all Member States to various domestic constraints imposed by judicial codes, practices and national constitutions.

To understand why in the UK the ECJ requirements are not always met, it is necessary to look at the rules enabling UK courts to recognise Community law⁴. Yet, one feature must be stressed at the outset: UK courts were placed in a more comfortable position than those of the six founding Member States.

2.2.1 No surprise for the UK courts

By the time of British accession, the concepts underlying the Court's vision of the requirements of the Community legal order had already been developed. In *van Gend en Loos*, it was reasonable for some Member States to argue that the ECJ had elaborated the obligations undertaken by them in a way that involved a transformation of their nature, going well beyond what the Member States had thought they had undertaken. For the UK on the other hand, things were quite different. The fact that the EEC Treaty was different from any other international law treaty had been clearly set out in the Commission's papers on negotiation of Accession Treaties. The doctrine of primacy of Community law

as elaborated by the ECJ, was well understood by the British Government at the time when membership negotiations started¹⁵. In fact, the claim to Primacy was known and understood well enough to be relied upon in proceedings aimed at preventing entry into the Community¹⁶. So whilst the European Communities Act 1972 is sometimes described as "a masterpiece of writing designed to minimise political controversy"¹⁷, UK accession took place in the full knowledge of the rules. As Lord Bridge acknowledged in *Factortame*:

*"if the supremacy within the European Community of Community law was NOT ALWAYS INHERENT in the EEC Treaty it was certainly WELL ESTABLISHED long before the United Kingdom joined the Community. Thus, whatever limitation of its sovereignty Parliament accepted when it enacted the European Communities Act 1972 was entirely voluntary..."*¹⁸.

It may be that the implications of supremacy were ignored when the debate over Community Membership was conducted. It may also be the case that Ministers did not go out of their way to explain the constitutional significance of Accession, as Membership had become the overriding priority¹⁹. Nonetheless, the fact is that the UK Government, unlike the founding Member States, joined a system in the knowledge that it had already been transformed into a new legal order of International law.

Furthermore, while courts in the UK had no power to review the validity of UK law²⁰, there are no separate constitutional courts with exclusive jurisdiction to pronounce on the validity of national legislation, a fact which has caused particular problems in other jurisdictions. In any jurisdiction, courts may have difficulty establishing the basis upon which to refuse to apply provisions of domestic law in conflict with provisions of Community law. Yet, in jurisdictions with a constitutional court the problem is more acute. Indeed, if the refusal is based on the constitution, it then becomes a question of the constitutionality of domestic legislation, a question which ought to be left to the constitutional court²¹. In sum, on one view, the UK was in a relatively comfortable situation in terms of being able to accommodate the requirements of Community law.

2.2.2 The principle of Parliamentary Sovereignty

The main constitutional hurdle for UK courts was the concept of Sovereignty of Parliament.

*"Parliament has the right to make or unmake any law whatsoever; and no person or body is recognised by the law as having the right to override or set aside the legislation of Parliament...Judges sit as servants of the Queen and the legislature and so long as an Act of Parliament exists as law the courts are bound to obey it."*²²

In the UK, the major constitutional hurdle was how to ensure that the supremacy of Community law would not be abrogated by the doctrine of implied repeal through the operation of a later inconsistent statute. According to the doctrine of parliamentary supremacy or sovereignty of Parliament, there are no entrenched laws and the provisions of an Act of Parliament will impliedly repeal any prior rule of law – which might include Community rules – with which they are inconsistent.

How did the UK reconcile the doctrine of parliamentary sovereignty with the transfer of apparently sovereign powers to the European Community? How did the UK accommodate itself to a substantial and continuing influx of law, the substance of which derives from outside Parliament and the application of which is likely to depend upon legal principles and practice somewhat alien to the existing legal system?

2.3 European Community Law in the UK: The European Communities Act 1972

Community law was incorporated into UK law by the European Communities Act 1972 (hereafter “the ECA”), “an Act which to the connoisseur of statutory drafting methods, must appear to be a collector’s piece²³”. A new source of law was recognised and a great volume of new law created for the UK by two short sections²⁴.

2.3.1 Community law must be given effect to according to its own nature

The Act provides, in effect, that rights arising from the Treaty are ‘enforceable Community rights’ to be applied and enforced as part of the law of the UK. As Sir Geoffrey Howe pointed out at the time:

*“Community law has not been incorporated into or made identical with our own domestic law. Our courts are simply required to give direct effect to Community law ACCORDING TO ITS OWN NATURE.”*²⁵

Section 2(1) provides:

“All such rights, powers, liabilities, obligations and restrictions from time to time created or arising under the Treaties, and all such remedies and procedures from time to time provided for by or under the Treaties, AS IN ACCORDANCE WITH THE TREATIES are without further enactment to be given legal effect or used in the U.K. shall be recognised and available in law, and be enforced, allowed and followed accordingly; and the expression ‘enforceable Community Right’ and similar expressions shall be read as referring to one to which this subsection applies”.

This section unquestionably expresses the will of Parliament to make UK law subject to Community law in the area of Community competence. By this provision, Parliament informed judges that Community law must be accepted on the terms it is made. Whether the right, power, liability, obligation or restriction is enforceable depends on Community law. The specific nature of Community law is acknowledged, and the ECA does not purport to transform its character; *what, as a matter of Community law, is Community law, will be law in the UK.*

2.3.2 The implementation of future Community obligations: section 2 (2) creates more restraints on the Sovereign Parliament.

Still, most Community obligations do require implementation. This is where section 2 (2) comes into play. This section provides for the implementation of future legal obligations by Order in Council or Regulations. Section 2 (2) deals with the enactment of subordinate legislation to put into effect Community obligations which so require. It also provides for the enactment of subordinate legislation for the enjoyment of Community rights. A clause such as section 2 (2) which confers power to legislate by way of Orders co-extensive with that of Parliament, in so far as Ministers may by subordinate legislation amend or repeal existing primary legislation, is known as a 'Henry VIII clause'. Such a "Henry VIII clause" is not specific to the ECA²⁶. However, the increased sphere of influence and growth of the power of the Executive at Parliament's expense constituted the biggest impact on internal constitutional arrangements following Accession²⁷. This is particularly so if one considers the volume of Community legislation which requires implementation. The fact that section 2 (2) is a very wide power with profound constitutional implications is further evidenced by the undertakings on its use given in Parliament when the ECA was enacted. Undertakings were given to the effect that section 2(2) would be used only as a last resort and that priority would be given to existing domestic powers. The reason for this is that the use of section 2(2) can circumvent restrictions contained in domestic powers such as a requirement for consultation or the use of affirmative procedure²⁸.

The fact that section 2 (2) is available to make subordinate legislation does not mean that recourse to primary legislation is no longer possible to give effect to Community obligations. In fact, recourse to primary legislation is necessary when the implementation of Community obligations involves making use of powers which would not be compatible with the restrictions imposed by Schedule 2 of the ECA. There are occasions where Community law is implemented by Acts of Parliament and even now in the devolution settlement context by Act of the Scottish Parliament²⁹. Regardless, it is arguable that recourse to subordinate legislation is actually the normal route given that Community legislation should be considered as the enabling legislation. Furthermore, at a presentational level it is difficult to introduce an Act of Parliament, but at the same time alert parliamentarians that their capacity to make amendments is severely constrained.

The opposite argument is that, when Community law does leave an appreciable margin of discretion to the Member States, then it would seem logical, and even desirable – particularly when such Community obligation has been adopted following mere consultation of the European Parliament, that this Community obligation be implemented through the introduction of primary legislation. That way, the use of the discretion left by the Community instrument can be subject to close scrutiny which the subordinate legislation route does not readily afford. This might contribute to making Community legislation more legitimate and democratic.

It has been argued that one of the obligations which should be included within the scope of section 2 (2) is the obligation under Article 10 EC “to facilitate the achievement of Community’s tasks”³⁰. It is not certain this interpretation would still be put forward today. Whether or not one agrees about this proposed interpretation of the scope of section 2 (2), it is clear that given the ambit of what may fall in the Community sphere, the powers conferred by section 2 (2) are very wide, in spite of the limits set out in Schedule 2 of the Act on what can be the subject of such subordinate legislation³¹.

2.3.2.1 Problems with section 2 (2)

As stated above, the implementation of Community obligations can – subject to specific exceptions – be done through statutory instruments – and the enabling power to make these instruments is section 2 (2) of the ECA. The powers given under this section are very broad and may be further extended if a broad interpretation is given to “matters *related* to a Community obligation or right”. For section 2 (2) to be used validly as an enabling power to make a statutory instrument, there must be a link and/or connection and/or relation between matters covered by the Community obligation and the matters covered by the statutory instruments purporting to implement that Community obligation.

What then happens if recourse is made to section 2 (2) to make Regulations to cover matters which only have a loose connection with matters which a Community instrument intends to regulate? Or put another way, are there any effective checks on recourse to section 2 (2) as an enabling power? Thus, where a Directive lays down minimum provisions, is it appropriate to use section 2 (2) of the ECA as an enabling power to make regulations which go beyond the requirements laid down in the Directive? These are not mere academic questions for there is evidence that recourse to section 2 (2) is made in a variety of cases where only a strenuous link with a particular Community instrument exists, and with some real consequences since ultimately Ministers have the power by virtue of section 2 (2) to amend primary legislation. The High Court had to provide an interpretation of “relates” in *R v. Secretary Of State for Trade and Industry ex parte Unison*³² and considered that the word “relate” included all obligations which even though not required by Community law were not “distinct, separate or divorced from it”. There is also the further guarantee

that, as a matter of Community law, any additional conditions not required by Community law, but merely authorised by the parent Community instrument must of course be compatible with the Treaty, a requirement upheld by the High Court in *R v. MAFF ex parte NFU*³⁵.

Another issue related to section 2 (2) which is worthy of note is whether this section provides an appropriate power for the introduction of UK Regulations designed to implement a Community directive where the deadline for implementation of this particular instrument has not yet expired, and whether it is possible to prevent the introduction of such subordinate legislation by bringing a challenge to the validity of the Directive.

2.3.2.2. Arguments based on section 2 (2)

The fact that the majority of Community obligations which require implementation are being given effect through powers under section 2 (2) has on occasion meant that the UK courts have had to consider whether Community law itself would place limits on the powers of the UK Ministers to make the required subordinate instruments. Arguments based on section 2 (2) were used on at least the following occasions. In *Duddridge*³⁴, in an application for judicial review of the decision of the Secretary of State for Trade and Industry declining to issue regulations restricting the electro magnetic fields from electric cables, an unsuccessful argument was attempted to the effect that the Secretary of State had, by virtue of section 2(2), an obligation under European Community law to apply the precautionary principle and to interpret his statutory powers and duty so as to accord with Community law, namely Article 174 EC. In the *EOC* case, the applicants sought, *inter alia*, an order of mandamus to compel the Secretary of State to exercise his powers under section 2(2) in order to rectify the breaches of Community law contained in the Employment Protection (Consolidation) Act 1978.

There have also recently been challenge to legislation adopted under section 2(2), notably on the ground that this section was only to be used to effect minor changes. Such arguments have been resisted. Indeed, the conferment of such a power and its use is not really so objectionable on constitutional grounds. Indeed, if such clauses are indeed "giving the executive what normally belongs to the legislature"³⁵, it is the legislature which decided to give the executive this power. It has also been suggested that Parliament could also if it wanted protect Acts from such a clause by stipulating when it passes them that they are not to be touched by this Henry VIII power.

2.3.3 Primacy just a rule of construction?

The principle of Parliamentary Sovereignty in principle applies to the ECA as well as any other statutes, since technically, no hierarchy of law exists³⁶.

The ECA was carefully drafted so as to fit in with the theory of parliamentary sovereignty. It did not purport to affect the legislative competence of Parliament. It merely controlled the consequences of legislative activity by creating a duty of construction for courts. The Act denies effectiveness to legislation in conflict with Community obligations. By virtue of section 2(4):

"... any such provision (of any such extent) as might be made by Act of Parliament, AND ANY ENACTMENT PASSED OR TO BE PASSED, other than one contained in this Part of the Act, shall be construed and have effect subject to the foregoing provisions of this section." (emphasis added)

In this section, Primacy is reduced to a matter of statutory interpretation. In this way, parliamentary sovereignty is said to be respected for the adoption by UK courts of canons of interpretation which at times may depart from the traditional orthodoxy but which is in fact authorised by the ECA.

"In construing our statute, we are entitled to look to the Treaty as an aid to its construction; but not only as an aid but as an OVERRIDING FORCE. If on close investigation it should appear that our legislation is deficient or is inconsistent with Community law by some oversight of our draughtsmen then it is our bounden duty to give priority to Community law. Such is the result of s.2(1) and s.2(4) of the European Communities Act 1972".³⁷

The courts have to presume that any inconsistency with Community law contained in a British statute was unintended and accidental. As a result, when overriding the domestic provision, they are doing no more than fulfilling Parliament's real and genuine intention – to comply with Community law.

From a Community perspective, dressing up primacy as a rule of construction pays lip service to the doctrine. This is because the solution to a possible conflict of norms rests on a comparison of the substance of a Community rule with the substance of a national rule. Yet, the substance of a Community rule is not a matter for national judges.

The proper legal response to a conflict between a statute and the requirements of Community law is not to consider whether the later national legislation is inconsistent with the earlier Community rule, rather it is to consider whether it repeals or amends the statute by virtue of which the Community rule was transposed into UK law. Hence, the crucial question is whether the later legislation, in conflict with Community law, purports to amend or repeal the ECA. This approach was adopted by Lawton L.J. in *Macarthy v. Smith*³⁸:

"Parliament's recognition of European Community Law and of the jurisdiction of the Court by one enactment can be withdrawn by another. There is nothing in the Equal Pay Act 1970 as amended by the Sex Discrimination Act 1975 to indicate that

Parliament intended to amend the European Communities Act 1972 or to limit its application”.

In this way, judges are in effect accepting that the ECA is not an ordinary statute³⁹, for it cannot be repealed but by ‘intentional and express repudiation’. It is of course always possible for the UK to enact legislation purporting to repeal the ECA, but this repudiation would mean that the UK no longer intends to remain in the Union.

The question of the effect of a purported express departure from Community law remains to be addressed, and may never be addressed. As time passes, the argument grows ever stronger that, the longer the United Kingdom remains a Member of the European Union and honours its obligations as a Member State, the likelier it is that the United Kingdom courts will insist that partial compliance with Community law, even if ordained expressly by statute, is not legally possible. In this context, it is worth mentioning that as far as Acts of the Scottish Parliament are concerned, all of this is entirely academic anyway: the Scotland Act provides that Scottish legislation incompatible with EC law is outwith the competence of the SP. Accordingly it shall have no legal effect. Ironically this also means that the Scotland Act constitutes another category of superior statutes, since whatever a UK statute may say the devolved institutions cannot do anything incompatible with Community law. In other words, Community law has a superior status in Scotland that an Act of the Westminster Parliament, since even if an Act of Parliament required that a particular course of action be taken, if such a course of action was incompatible with Community law, it could not be taken.

2.3.4 The ECJ as the UK supreme court?

Section 3(1) of the ECA provides that:

“for the purposes of all legal proceedings any question as to the meaning or effect of any of the Treaties, or as to the validity, meaning or effect of any community instrument, shall be treated as a question of law (and if not referred to the European Court), BE FOR DETERMINATION AS SUCH IN ACCORDANCE WITH THE PRINCIPLES LAID DOWN BY AND ANY RELEVANT DECISION OF THE EUROPEAN COURT OR ANY COURT ATTACHED THERETO.”

Parliament thus instructed judges that they must accept Community law, not only on the terms it is made⁴⁰, but as interpreted by the ECJ. Parliament informed judges that the limits of what they can do are determined by the ECJ. Such a provision may not appear surprising in a legal system where case law is such a prominent source of law. It might also have been necessary in the light of the theory of precedent. Still, it remains a central provision, and one which goes further than any other national incorporating provision, for UK courts are

bound by the Treaty, the legislation made under it, *and* also by the judge-made law.

Section 3 (1) is also, interestingly, a section which contradicts the others. By giving the European Court case law the status of a formal source of law, it acknowledges the specific nature of Community law which precisely rejects the need for incorporation, and treats national arrangements for the incorporation of treaties as irrelevant. For the ECJ, direct effect and primacy mean that Community law penetrates the national legal order and becomes the highest norm in the national legal order without any need for incorporating legislation, as Community law is not dependent on national law.

Another significant aspect of section 3 (1) is that it goes well beyond any of the duties created for the courts under the Human Rights Act 1998 (hereafter the HRA)⁴¹. Indeed there is no scope for developing an isolated UK based jurisprudence on Community law, whereas there is such scope in relation to Convention Rights⁴². An illustration of the approach taken to the construction of section 2 of the HRA is provided by *Alconbury*⁴³. Lord Slynn indicated that

"in the absence of some special circumstances it seems to me that the court should follow any clear and constant jurisprudence of the European Court of Human Rights"

Lord Hoffman gave some clear indication as to what the special circumstances might be:

"THE HOUSE IS NOT BOUND BY THE DECISIONS OF THE EUROPEAN COURT [the Strasbourg Court] and if I thought they compelled a conclusion fundamentally at odds with the distribution of powers under the British Constitution, I would have considerable doubt as to whether they should be followed."

Another key issue for UK courts is what falls to be regarded as 'enforceable Community rights'. At present, the concept seems to be limited to situations where the Community right is embodied in terms which can be construed as having direct effect. Nevertheless, it is *not* for UK courts to supply their own definition of the term 'enforceable Community rights'. It is suggested that section 3 (1) of the ECA requires that *all* Community law which can be enforced, by whatever means, has to be enforced. In other words, whenever, as a matter of Community law, national judicial intervention is required, UK courts are instructed, by virtue of section 3(1), to intervene to give full effect to Community law or safeguard effectively the Community rights which Community law has created for the benefit of individuals. National legislation may be necessary to enable the courts as a matter of national law to recognise the Community rules, yet the substantive content of the rules and the different ways in which Community rules can be made available and enforced in the UK is entirely a matter of Community law. Community law is not created by national legislation. In the words of Sir Geoffrey Howe, Community law takes effect by virtue of an Act of

Parliament, but not 'as if enacted thereby'⁴⁴. It may be that in *Factortame*, given that the protection was sought in relation to *merely putative Community rights* the granting of interim relief was based on section 3(1) of the ECA rather than on section 2(4)⁴⁵. The relationship between section 2 (4) and section 3 (1) will be explored further below.

2.4 Judicial review of primary UK legislation

The most widely publicised judicial consideration of the meaning and breadth of the ECA was provided in the speech of Lord Bridge in *Factortame*:

*"...Under the terms of the ECA it has always been clear that it was the duty of a UK court, when delivering final judgment, to override any rule of national law found to be in conflict with any directly enforceable rule of Community law."*⁴⁶

2.4.1 Parliament must obey Community law

In *Factortame* a challenge to the validity of the Merchant Shipping Act 1988 was mounted. This Act laid down a number of restrictions to the registration of fishing vessels, as another attempt⁴⁷ to curb 'quota hopping', i.e. to stop Spanish vessels registered as British vessels to fish against the British quota. The significant question raised by the case was that of the status to be accorded to an Act of Parliament until a decision is made on its validity. The Court of Appeal, and initially the House of Lords, had come to the conclusion that under the UK constitution, the UK courts had no power to disapply or suspend Acts of Parliament; further that there was no constitutional authority conferring upon any court such a power. Nonetheless, the House of Lords was prepared to inquire whether, as a matter of Community law, the UK courts would have jurisdiction to grant interim injunction against the Crown, thereby, in this author's view, implying their willingness to grant such a remedy: "Does Community law either oblige the national court to grant interim protection or give the court power to grant such interim protection?"

The ECJ dealt with the question as if there was a rule of English law which prevented a court from exercising such jurisdiction and held that:

"a national court which in a case before it considers that the sole obstacle which precludes it from granting interim relief is a rule of national law must set aside that rule."

2.4.2 The authority to give effect to Community law comes from Community law

From the ECJ perspective, *Factortame* was just another case where the full requirements of primacy were being tested. The ruling fully conforms with the logic pursued by the ECJ. Accordingly some criticisms of the case appear based on a misconception of the ECJ approach to primacy. The ECJ was criticised for dealing with the question in negative terms, as if there was a rule which prevented a court from granting interim relief, when in truth there was no such rule. In so doing, the ECJ had bypassed the real issue, namely the absence of any constitutional authority conferring upon a UK court a power of such a nature. The question the ECJ allegedly refused to answer was whether the authority came from Community law. However, the ECJ did address this very issue right at the outset⁴⁸. The ECJ perspective has always been that Community law takes effect in the national legal orders without reference to national law. This necessarily implies that the authority to give effect to Community rules comes from Community law.

2.4.3 The wider ramifications of *Factortame*

Factortame has wider ramifications inasmuch as since any court in the UK may be called upon to protect Community rights, any court in the UK can suspend the application of an Act of Parliament to protect putative rights in Community law. From a UK perspective, parliamentary sovereignty is said not be questioned, for Parliament itself instructed the courts to follow the logic of supremacy⁴⁹.

In *EOC*, the UK courts further explored what recognition of the primacy of Community law entails. They accepted that the UK courts were competent to hear applications of judicial review of primary UK legislation, and make declarations of incompatibility of UK Acts with the Community superior norm. In *EOC*, the Equal Opportunities Commission challenged provisions of the Employment Protection (Consolidation) Act 1978 which governed the right to compensation for unfair dismissal and the right to statutory redundancy pay on the basis that it violated Article 141 EC and the Equal Treatment Directive. The case raised the central issue of national judicial competence as the Secretary of State had argued that EC law generated only private rights before national courts. Accordingly only persons enjoying directly effective rights could bring an action to disapply national legislation, and a declaration that a Member State was in breach of its Community obligations could only be secured through the machinery provided for under the EC Treaty, namely Articles 226 or 227 EC⁵⁰. The House of Lords did not agree. Instead the House of Lords accepted that UK courts had new powers of legislative review, which empowered them directly. The expansion of the public law remedies of judicial review has continued unabated since.

2.5 "An irreversible transfer"⁵¹

Sovereignty of Parliament can be defined as the absence of any legal restraint upon the legislative power of Parliament. In the UK context, it has been shown that Parliament has never been competent to legislate upon any subject matter; that Parliament was not born free⁵², and that "the legislative history of the British Isles is one of transfers and one of delegation"⁵³.

Conversely, absence of legal restraint also implies that, once Parliament has legislated, no court or other body has the power to review the validity of legislation. In this respect, belonging to the Community means accepting the existence of a higher norm against which to measure the compatibility of national legislation, and as has been argued above, all British judges – whatever their hierarchical position in the UK judiciary are, as a matter of Community law, empowered to do just that. The House of Lords has accepted that there was no constitutional bar to an application before the UK courts directly seeking judicial review of primary legislation alleged to be in breach of Community law⁵⁴.

2.5.1 The UK Parliament is no longer the sole legislator

Furthermore, the enactment of legislation binding within the UK is no longer the sole concern of the UK Parliament. The UK's accession resulted in some transfers of sovereignty to the Community. As was quickly acknowledged, approximation of laws by directives "causes an irreversible removal of legislative power from the United Kingdom Parliament ... A Member State no longer has the powers it has transferred to the Community, including the power to affect individuals in certain areas of law"⁵⁵. In the early Eighties, it was already possible to say that

*"the stage has now been reached where the current legal and political reality is that there has been a transfer of powers to the Communities. ... Whilst the political reality remains membership of the Community, such powers are unlikely in practice to be recovered, and at least to that extent the transfer can be regarded as irreversible"*⁵⁶.

2.5.2 Identifying the boundaries of Parliamentary sovereignty

Whether the UK Parliament intended to refrain from exercising its own legislative powers rather than transfer its own powers in the area in which Community legislative powers operate seems immaterial, although the argument occasionally resurfaces⁵⁷. The true debate nowadays focuses not on the existence of a transfer, but on its scope. The reality in the Community is that transfer appears to be a continuous process whose precise scope alters as the Communities develop. Further, the Member States, in spite of their attempts, have little success in controlling the expansion of Community competences. For some Member States, the problem is no longer arguing about whether sovereignty

is limited or transferred in the area of Community competences. Rather, the problem is how effectively to limit – if not curtail – the expansion of Community competences. This debate, in turn, poses real problems for judges. British judges must be confident that the expansion of Community competence is acceptable within the British Constitution; quite a different thing from accepting that, in the spheres where it applies, Community law is supreme.

Statutes owe their legal force in the final analysis to judicial recognition, and the ECA is no different in this respect. Judicial recognition of the ECA rests on the judges' belief that Parliament and the British people have chosen to join a supranational entity understanding and accepting the legal and political consequences of such membership.

"British judges sit to administer the British Constitution, they cannot give unconditional allegiance to the Community as a superior source of law unless they are confident that this is compatible with British constitutional commitment. As European integration deepens, there are more and more radical transfers of legal authority. For all practical purposes, the Sovereignty of Parliament is curtailed by continued membership. It is not merely the consequence of a rule of construction. FACTORTAME represents a rational attempt to explore the boundaries of legislative sovereignty within the contemporary constitution- even if the decision is presented in largely technical terms with little serious attempts to articulate the constitutional considerations at stake."⁵⁸

Identifying the boundaries of Parliament, legislative sovereignty becomes tantamount to delimiting the proper scope of application of Community law. Such an issue has recently been the object of some debate in the context of the use of general principles of law in judicial review proceedings⁵⁹. It is an issue which deserves special consideration in so far as it places the unconditional acceptance of supremacy made in *Factortame* under a rather novel form of constraint. Like the German and Danish Constitutional courts the acceptance of Community law is subordinated to Community law remaining between boundaries which are to be policed by the UK courts. Laws LJ held that

"the duty to obey the Treaty is to be sharply distinguished from law which is made by a court of limited jurisdiction, such as the Court of Justice. The legitimacy of that law depends upon its being elaborated by the Court within the confines of the power with which it is already endowed. [...] Although (by virtue ultimately of the ECA) its decisions are as a matter of English law supreme, its supremacy runs only within its appointed limits".⁶⁰

2.6 General Principles of Law and the UK courts

Essentially the general principles of law (hereafter "the GPL") applied in the Community legal order cannot be used to assess the lawfulness of national legislation which lies outside Community law. Domestic legislation may be assessed on the basis of the GPL in two sets of circumstances: first, where the national legislation implements Community rules; secondly, but more indirectly, where a Treaty provision derogating from the principle of freedom of movement is relied upon by a Member State in order to justify a restriction of freedom of movement stemming from that Member State's legislation. In such cases the ECJ uses the fundamental rights in order to give a restrictive or extensive interpretation of the derogations laid down in the Treaty⁶¹.

It is important to bear in mind that, until the entry into force of the HRA⁶², the main method of incorporating human rights arguments within an action of judicial review was by reference to the general principles of law as a source of Community law. With the entry into force of the HRA, arguments based on the GPL have decreased significantly, certainly in Scotland there has not been one single devolution issue based on Community law.

Application of the GPL by the UK courts has been inconsistent. Sometimes UK courts have applied them; on occasion they have refused to do so. This is to be expected as the judiciary displays varying degree of inclination to be involved in what often amounts to an adjudication of policy issues, yet as will be shown, this rationale does not really appear to be applicable in all circumstances where UK courts have been faced with arguments involving the application of the GPL.

2.6.1 The reach of Community law.

The first objection to reference to GPL before the UK courts is that such matters are entirely domestic, to be solved by reference to national law alone. In *Hamble*⁶³, the objection was vigorously rejected, as "unreal", but it was found valid in *First City Trading*⁶⁴. Then again, given the factual background of both cases, the connection with Community law should have been approached in a comparable fashion.

Hamble concerned a change⁶⁵ instituted by the British Government in the licensing regime relating to the conditions under which fishing for pressure stocks was to be permitted, within the context of the Community fisheries policy. Under the new regime, some fishermen would not qualify for a licence. Some of these fishermen made an application for declaratory and prerogative relief to secure a licence entitling their vessel, *Nellie*, to fish by beam trawl for pressure stocks in the North Sea. They argued they had a legitimate expectation that any change in the licensing policy would not be such as to frustrate the completion of the process of licence aggregation.

In *First City Trading*, an application for judicial review of the Beef Stocks Transfer Scheme was brought by six meat exporters. Following the Commission

decision banning exports of British beef, the beef industry suffered considerable loss. The UK government introduced a scheme for emergency financial aid to the slaughtering industry. The scheme was open *only* to those who operated their own slaughterhouses, or cutting plants, whether or not they were also beef exporters. The legality of the scheme was challenged as violating a fundamental principle of Community law, that of equality, or non-discrimination.

So while the facts were relatively similar, diametrically opposed decisions were reached as to the ambit of Community law.

In *Hamble* the High Court considered that:

"although the exercise is the formulation of policy within a discretion conferred entirely by domestic legislation; the purpose of legislation and policy alike is to permit the UK, under the principle of subsidiarity, to exercise its powers for the purposes of implementing the common fisheries policy of the European Community."

Sedley LJ further remarked that, if each Member State carried out its part of this joint exercise in accordance with its own domestic law, a major objective of the policy would be frustrated. The availability of eventual recourse to the ECJ from and against all Member States in relation to the carrying out of the common agricultural policy confirmed that domestic courts had to have full regard to the case law of the ECJ.

By contrast, in *First City Trading*, Laws LJ questioned the precise status of general principles of law given that they were not provided for under the Treaty, but had been developed by the ECJ:

"it is by no means self-evident that their contextual scope must be the same as that of Treaty provisions relating to discrimination or equal treatment – statute law taking effect according to their own, express terms".

This approach is in direct contradiction to that of the ECJ. The ECJ never determined the boundaries of Community law differently according to the nature of the Community rules involved⁶⁶. Rather, on numerous occasions⁶⁷, it held that the various references to non-discrimination throughout the Treaty or the secondary legislation were simply the expression, in the relevant fields, of the principle of equality, one of the fundamental principles of Community law.

Laws LJ further declared that:

"it is of the first importance to notice that falling within the scope of the Treaty is by no means the same thing as acting under powers or duties conferred or imposed by Community law- such as giving effect to a Directive. ...The power of the Court of Justice, as it seems to me, to apply (whether on an Article 177 reference or otherwise) principles of public law which it had itself evolved cannot be deployed in a case where the measure in question, taken by a Member State, is not a function of Community law at all.[...] There is no legal space for the application of the general principles of

law to any measure or decision taken otherwise than in pursuance of Treaty rights or obligations. No court can expand the Treaty provisions. The position is altogether different where a measure is adopted PURSUANT to Community law; this is the second situation. Then, the internal law of the Court of Justice applies."

In this instance, although the applicants relied on a Regulation by virtue of which support was given to the British beef market in the wake of the ban, and pointed out that the Scheme had been notified as a State aid, the interdependence of the Scheme with the Community regime was not recognised. The scheme was neither authorised nor required by Community law, hence, the principle of equal treatment – through whatever medium⁶⁸ – could not be relied upon.

The High Court decision in *First City Trading*⁶⁹ was that a Community context was not sufficient for the application of the general or fundamental principles of law identified by the ECJ.

"Although I am being asked to apply the principle of equal treatment as a domestic judge, I must decide whether to do so having regard to the lawful confines of the power of the Court of Justice"

were also applied in *Lunn Poly*⁷¹. In that case, differential rates of insurance premium tax were challenged as violating the general principles of non-discrimination and proportionality. The Divisional Court held that application of these principles to insurance premium tax would involve a *wholly unwarranted encroachment on the sovereign powers of the UK*. First, it was clear that under the terms of Article 93 EC, the Member States had yielded sovereignty *only* to the extent that harmonisation of legislation concerning turnover taxes, excise duties and other forms of indirect taxation had been imposed, and Article 33 of the Sixth Directive implicitly recognised the continuing sovereignty of Member States. Accordingly, Parliament was not purporting to act within the scope of a Community enabling provision in introducing insurance premium tax. Secondly, while the ECJ had identified general or fundamental principles, such as non-discrimination and proportionality, "principles not wholly apparent from a perusal of the Treaty", the ECJ was a court of limited jurisdiction. Where action taken under domestic law, fell within the scope of the Treaty's application, then the ECJ could require that the Treaty be adhered to, but no more. But since these principles are elaborated by the ECJ rather than included in the Treaty, there was no legal space for their application to any measure taken otherwise than in pursuance of Treaty rights or obligations.

2.6.2 The boundaries of judicial authority

Even when national judges are prepared to recognise that a particular situation falls within the ambit of Community law, some other issues may arise. The

application of the GPL requires national judges to make difficult choices, and to take on board roles and responsibilities they might not be ready or willing to discharge. Laws LJ in *First City Trading*, considering the principle of equality, insisted on the need to travel within the boundaries of proper judicial authority:

*"there must remain a difference between the approach of the court in arriving at a judicial decision on the question in whether a measure is objectively justified, and that of the primary decision-maker himself in deciding upon the measure in the first place.[...]The decision-makers enjoy a political authority and carry a political responsibility, with which the courts are not endowed"*⁷².

Besides, applying the GPL can, on occasion, become an exercise in comparative law, and national courts may prefer to rely on national standards or refer to their own domestic experience to construe the meaning of a specific general principle and apply it. By contrast, from a Community perspective identifying the meaning of GPL by comparing them to national law should be avoided, otherwise they may get affected (or infected) by national references, and the uniform application of Community law might thus well be compromised. In other words, the principle of autonomy of Community law would appear to require that defining the meaning of the different GPL should be *entrusted* to the ECJ rather than left to the ECJ. Still it hardly seems possible to iron out different understandings, assumptions and perceptions about the nature and function of public law throughout the Community. More importantly, such an exercise is also not desirable given the need to respect the principle of subsidiarity.

2.6.2.1 When applying the principle of legitimate expectation

In *Hamble*, the High Court was prepared to consider fully the case law of the ECJ on legitimate expectation, and to quote the doctrine⁷³:

"for the principle of the protection of legitimate expectations to be applicable, an objective basis must exist for this principle in the shape of an EXPECTATION which is WORTHY OF PROTECTION. Because of the BROAD FREEDOM OF ACTION ENJOYED BY THE LEGISLATURE, the mere existence of a legal rule is not normally a suitable basis for a legitimate expectation which must be taken into account. Adequate grounds for a solid expectation can be provided on the one hand by the fact of having entered into certain obligations towards the authorities, or on the other hand by a course of conduct on the part of the authorities giving rise to specific expectations – which in certain circumstances may arise out of a commitment entered into by the authorities."

Sedley LJ held that the

"legal alchemy which gives an expectation sufficient legitimacy to secure enforcement in public law is the obligation to exercise powers fairly which permits expecta-

tions to be counterposed to policy change, not necessarily in order to thwart it but – as in the present case – in order to seek a proper exception to the policy. While policy is for the policy-maker alone, the fairness of his or her decision not to accommodate reasonable expectations which the policy will thwart remains the court's concern (as of course does the lawfulness of the policy). [...] It is the court's task to recognise the constitutional importance of ministerial freedom to formulate and to reformulate policy; but it is equally the court's duty to protect the interests of those individuals whose expectation of different treatment has a legitimacy which in fairness outtops the policy choice which threatens to frustrate it.[...] Legitimacy was a function of expectations induced by government and of policy considerations which militated against their fulfilment. The balance in the first instance was for the policy-maker to strike; but if the outcome was challenged by judicial review, the court's criterion was not the bare rationality of the policy-maker's conclusion and its task was not only to recognise the constitutional importance of ministerial freedom to formulate and to reformulate policy, but also to protect the interests of those individuals whose expectations of different treatment had a legitimacy which in fairness outweighed the policy choice which threatened to frustrate it."

In the circumstances, it was not found unfair, in the light of the government's legitimate policy imperatives and objectives, to exclude from the policy's transitional provisions enterprises in the position of the applicant. In view of that, the principle of legitimate expectation was found not to have been breached.

2.6.2.2 When applying the principle of proportionality

Laws LJ highlighted differences and similarities between *Wednesbury* and European review.

"In the former case the legal limits lie further back.[...] The limits of domestic review are not, as the law presently stands, constrained by the doctrine of proportionality. The European rule requires the decision-maker to provide a fully reasoned case. The Court will test the solution arrived at, and pass it only if substantial factual considerations are put forward in its justification: considerations which are relevant, reasonable, and proportionate to the aim in view. But the Court is not concerned to agree or disagree with the decision. WEDNESBURY and European review are different models – one looser, one tighter – of the same juridical concept, which is the imposition of compulsory standards on decision-makers so as to secure the repudiation of arbitrary power."

This statement echoes that of Sedley J for whom the real question with legitimate expectation is one of "fairness in public administration".

2.6.2.3 When protecting the right to property

The principle of the protection of the right to property and its requirements have been considered by the ECJ in a number of cases. Two such cases were references for preliminary rulings sent by the UK courts⁷⁴. These cases related to circumstances where compensation was sought (i) by tenant farmers at the expiry of their lease where its milk quotas were transferred to the landlord at the expiry of the lease, or (ii) by landlords where tenant producers were able to transfer their quotas or premiums rights under a common organisation of market. The ECJ confirmed that the general principles of law only came into play in connection with situations which fell within the scope of Community law. The two cases' principal interest rests in the fact that the ECJ, like the UK courts, seems to agree that a mere connection with Community issues is not sufficient to bring a situation within the ambit of Community law. Therefore this is an issue which is likely to generate either a continuing dialogue between the national courts and the ECJ so as to identify the reach of Community law, or the mapping by national courts alone as to what they see as the reach of Community law.

The ECJ had to consider whether the principle of the protection of the right of property required Member States to introduce a scheme for payment by a landlord of compensation to an outgoing tenant who had contributed to the acquisition and increase of the milk quotas where at the expiry of the lease the milk quotas were transferred to the landlord. The ECJ held that the principle of the protection of the right to property did not require compensation to be paid in such circumstances because *advantages allocated under a common market organisation cannot be regarded as a right derived from the assets or occupational activity of the persons concerned so that their transfer or attribution should be accompanied by an obligation to pay compensation*. In view of that, the ECJ held that Community law did not require the introduction by Member States of a scheme for payment of compensation by a landlord to an outgoing tenant.

Conversely, the ECJ had to consider whether the principle of the protection of the right of property required Member States to introduce a compensation mechanism for the loss suffered by the owners of agricultural land owing to the introduction of a system of premium rights linked to the producers, where the premium right is transferred by producers who do not own the land on which they farm. The ECJ confirmed that the principle of the protection of the right to property did not require compensation to be paid in such circumstances either. It repeated that advantages allocated under a common market organisation cannot be regarded as a right derived from the assets or occupational activity of the persons concerned so that their transfer or attribution should be accompanied by an obligation to pay compensation. Community law does not require Member States to introduce a scheme for payment of compensation by an outgoing tenant to the landlord, even where the owner of the land has suffered a detriment by virtue of the transfer by the tenants of the premiums rights.

The Scottish courts have taken bold steps in their use of the general principles of law. *Booker*⁷⁵ concerns an application for judicial review of legislation and certain actings of the Secretary of State for Scotland, following a compulsory slaughter order issued by the Secretary of State in pursuance of EC provisions for the control of fish diseases. In this case, the petitioners sought reduction of Regulation 7 of the Diseases of Fish (Control) Regulations 1994 and of a letter of the Secretary of State rejecting a claim for compensation of the loss incurred through the destruction of their fish stock, the Lord Ordinary granted a *declarator* to the effect that 'in failing to provide either by legislative or administrative measures for payment of any compensation where slaughter orders are made under Regulation 7 of the Diseases of Fish (Control) Regulations 1994, the respondent was acting illegally'. The Regulations were considered to fall within the scope of EC law. Accordingly, a national court overseeing their application had to consider *all* the rules of EC law, including fundamental rights, *in casu* that of respect for freedom of property. *Booker* raises important issues. In particular, can one deduce from general Community law principles for the protection of fundamental rights an obligation for the Member States to protect the economic interests of economic agents affected by the national implementation of Community measures? And if so, to what extent, and under what conditions, may an obligation be inferred from Community law to introduce compensation schemes? At present, the legal consequences of judicial review based on general principles of law, for the most part, still need to be worked out. The case was under appeal at the time of writing, and a reference for a preliminary ruling has been sent to the ECJ⁷⁶.

2.7 Conclusion

The fact that Community law prevails over UK law seems nowadays well accepted. In spite of some conflicting messages, the current attitude of the UK courts can be described as globally *pro-communautaire*. On the other hand, the basis for the rule that Community law prevails is not necessarily that put forward by the ECJ. This is to say the least rather surprising given that the specific character of Community law has been recognised and further enacted in the ECA. Parliament unmistakably required judges to abide by the requirements of the Community legal order as determined by the ECJ.

The fact that Community law takes effect only by virtue of a UK statute, and on the terms of the statute, renders it vulnerable, as the on-going difficulties about the definition of "enforceable Community rights" demonstrate; sometimes British judges are simply not prepared to accept that they have duties in relation to the whole corpus of Community law and not simply in relation to rights which cannot be construed as directly effective.

The precise legal status of the GPL, and thus the legitimacy of their application by UK courts has been questioned – an occasion for UK courts, like national

courts in other Member States – to signal that they are not prepared to abandon supervision over the exercise by the Community institutions of their powers. To this extent it can be said that GPL seem to be forming a new pocket of resistance for the UK courts⁷⁷.

Acceptance of Community law under the terms of the ECA has other knock-on effects as regards the practical implementation of Community law principles in the UK courts. For example, the consistent emphasis on the statutory nature of the gateway for Community law⁷⁸ explained the characterisation of the breach of the Treaty as a breach of statutory duty⁷⁹. Compliance with all the requirements of the Community legal order involves recognising direct effect and primacy by giving precedence to directly enforceable rights over inconsistent UK legislation. However it also requires that *all* judges in the UK ensure the full effect of provisions of Community law and protect *all rights* which persons enjoy under Community law, including those which cannot be effectuated directly⁸⁰. The courts in the UK should therefore be reminded of the full consequences of section 3(1).

It is also important at this stage to emphasise that the doctrine of the unlimited legislative competence of Acts of Parliament is not what it once was. This is not only due to the assaults of Community law. There have been a number of developments on the home front, principally the enactment of the Human Rights Act 1998 and devolution of legislative power from Westminster to the Scottish Parliament and other devolved administrations which have triggered a re-assessment of the traditional doctrine. Unfettered sovereignty is anyway contested and regarded as poor yardstick of a modern democracy. Whether or not Community law will benefit or suffer from the considerable re-thinking of orthodox constitutional ideas about the supremacy of Acts of the Westminster Parliament is however not a question to which a straight answer can yet be provided. One thing that is certain is that membership of the Union has ensured that issues of legal interpretation are now placed at the centre of the political process in the UK.

Endnotes

- ¹ *McWhirther v. Attorney General* [1972] CMLR 882 at 886.
- ² *Stoke-on Trent City Council v. B&Q* [1990] 3 CMLR 31, per Hofmann, J.
- ³ *Pigs Marketing Board v. Redmond*, [1979] 3 CMLR 118. Armagh Magistrates Court Mr W.B. McIvor at 121 para. 17.
- ⁴ *Equal Opportunities Commission v. Secretary of State for Employment* [1994] 1 WLR 409 per Lord Keith.
- ⁵ Case 26/62 *van Gend en Loos v. Nederlandse Administratie der Belastingen* [1963] ECR 1.
- ⁶ Case 6/64 *Costa v. ENEL* [1964] ECR 585 at p 593.
- ⁷ Case 11/70 [1970] ECR 1125 at 1134.
- ⁸ Case 106/77, *Simmmenthal* [1978] ECR 629 at 644.
- ⁹ *Shields v. E Coomes (Holdings) Ltd* [1979] 1 All ER 406.
- ¹⁰ D. Curtin, "The Decentralised enforcement of Community law rights, judicial snakes and ladders", in D. Curtin & D. O'Keeffe (eds), *Constitutional Adjudication in European Community Law and National Law* (London: Butterworths, 1992) at 34.
- ¹¹ *Marshall v. Southampton & South West Hampshire Health Authority* [1988] 3 CMLR 389.
- ¹² Although the ECJ now invites national courts to extrapolate principles from its case law, see *R v. Secretary of State for Defence ex parte Perkins* [1998] IRLR 508.
- ¹³ See the Annual Commission Reports on the Application of EC Law.
- ¹⁴ Laws LJ in *S. Thornburn v. Sunderland City Council* [2002] 3 WLR 247 declared that "the fundamental legal basis of the UK relationship with the EU rests with the domestic not the European legal powers" at para. 69.
- ¹⁵ C. Munro, "the UK Parliament and EU Institutions-Partners or Rivals?" in *National Parliaments as Cornerstones of European Integration*, E Smith (ed) (London: Kluwer, 1996) pp. 80-99 at 86.
- ¹⁶ *Blackburn v. Attorney General* [1971] 2 All ER 1380, *McWhirther* [1972] CMLR 882. C. Munro, *Studies in Constitutional Law*.
- ¹⁷ S. Weatherill & P. Beaumont, *EC Law*, (London Penguin, 1st ed. 1993) p. 317.
- ¹⁸ *R v. Secretary of State for Transport ex parte Factortame* (No2) [1991] 1 AC 603 at 658, emphasis supplied.
- ¹⁹ M. Loughlin, *Sword and Scales, an examination of the relationship between law and politics* (Oxford, Hart, 2000) at 40.
- ²⁰ The view expressed in *Pickin v. British Railways Board* [1974] AC 765 has been clearly superseded by *R v. Secretary of State for Employment ex parte EOC* [1995] 1 CMLR 391, but also by the many recent developments which have taken place; and not just those flowing from the participation in European integration. Indeed the devolution of government responsibilities throughout the UK, the passage of the Human Rights Act 1998 and the major expansion of judicial review of governmental action have transformed the UK constitution into one which rests on a foundation of law. See M. Loughlin *op. cit.*
- ²¹ C. Boch, "Home Thoughts from Abroad" in *In Search of New Constitutions*, Hume Papers on Public Policy (EUP 1994) 28-52.
- ²² A.V. Dicey, *The Law of the Constitution*, (ed E C S Wade), 10th edn, 1959 p. 39.
- ²³ Scarman [1973] 24 NILQ 61.
- ²⁴ The Bill which became the ECA was passed by a majority of 8, although in the previous general election the Conservatives had acquired a majority of 43, thereby signalling the start of the intra-party disunity over Europe which has persisted ever since. C. Munro, *op. cit.* at 83.
- ²⁵ J. Usher, *European Community Law and National Law: the Irreversible Transfer?* (London: Allen & Unwin, 1981).

- ²⁶ See for example section 105 of the Scotland Act 1998.
- ²⁷ P. Birkinshaw, "European Integration and UK Constitutional law" (1997) European Public Law.
- ²⁸ All instruments made under section 2 (2) are subject to a negative procedure.
- ²⁹ The Water Framework Directive is going to be implemented in Scotland through the introduction of an Act of the Scottish Parliament.
- ³⁰ L. Collins, *European Community Law in the United Kingdom* (London: 4th edition Butterworths, 1990) at 114.
- ³¹ E.g. Schedule 2, para 1(2) does not include the power to make any provision imposing or increasing taxation.
- ³² [1997] 1 CMLR 459.
- ³³ [1995] 3 CMLR 117.
- ³⁴ *R. v. Secretary of State for Trade and Industry*, ex parte *Duddridge* [1995] 3 CMLR para. 58 (QBD) upheld in the Court of Appeal.
- ³⁵ Laws LJ in *S. Thornburn v. Sunderland City Council* [2002] 3 WLR 247 at para. 50.
- ³⁶ This remains true despite a number of judicial pronouncements to the effect that the ECA is an entrenched or Constitutional statute.
- ³⁷ *Macarthy v. Smith* [1979] 3 All ER 325 at 329, emphasis supplied.
- ³⁸ [1979] All ER 325 at 334.
- ³⁹ For a recent characterisation of the ECA as a constitutional statute see Laws LJ in *S. Thornburn v. Sunderland City Council* [2002] 3 WLR 247 at para. 69.
- ⁴⁰ Section 2(1).
- ⁴¹ Section 2 (1) of the Human Rights Act 1998 only provides that the ECHR court case law must be "taken into account".
- ⁴² And on one view, even an isolated Scottish based one, see Clyde and Edwards, *Judicial Review*, (Edinburgh, Green, 2000) at 302 who argue that: "within the UK, the distinct identity of the component parts has not only long been recognised, but is now being fortified by devolution. In particular, the existence of the Scottish Parliament has its origins, perceived or real, between Scotland and other parts of the UK. Accordingly it may well be that the distinct powers of the courts over Scottish legislation justify granting a margin of appreciation to the SP".
- ⁴³ *R (Alconbury Developments Ltd) v. Environment Secretary* [2001] 2 1389 per Lord Bridge at 1389 para 26, and per Lord Hoffman at para. 76).
- ⁴⁴ Usher *op. cit.* at 33 and 34.
- ⁴⁵ S. Weatherill & P. Beaumont, *EC law*, (London Penguin, 2nd ed. 1995) p. 373.
- ⁴⁶ *R v. Secretary of State for Transport* ex parte *Factortame* (No 2) [1991] 1 AC 603 per Lord Bridge at 658, emphasis supplied.
- ⁴⁷ The UK – but also other Member States – endeavoured to deal with the phenomenon of quota hopping through a variety of national legislative measures which restricted and qualified the conditions for the registration of fishing vessels and the granting of licences. All these attempts were unsuccessful, for one example of a previous unsuccessful attempt see Case 3/87 *R v. MAFF*, ex parte *Agegate* [1989] ECR 4459 and also see R. R. Churchill, Quota Hopping the CFP wrongfooted in (1990) 27 CMLRev 405; D. Magliveras, "Fishing in Troubled Waters: The Merchant Shipping Act 1988 and the EC", (1980) 39 ICLQ 899. C. Noirfalisse, "The Community system of fisheries management and the Factortame case", (1992) 12 YEL 325.
- ⁴⁸ See *supra* the comments on *Simmenthal*.

- ⁴⁹ Lord Bridge in *Factortame II* [1991] AC 603 at 658.
- ⁵⁰ In other words in *EOC* the Secretary of State was reviving the Member States' arguments in *van Gend en Loos*.
- ⁵¹ Usher *op. cit.*
- ⁵² J.D.B. Mitchell, *Constitutional Law* (Edinburgh, Green, 1964).
- ⁵³ Usher *op. cit.*
- ⁵⁴ *Equal Opportunities Commission v. Secretary of State for Employment* [1994] 1 WLR 409.
- ⁵⁵ House of Lords Select Committee on the European Communities in its report on the Approximation of laws under Article 100 of the EEC Treaty (Session 1977/1978 22nd Report), Usher *op. cit.* at 36.
- ⁵⁶ Usher, *op. cit.*
- ⁵⁷ *R v. Secretary of State for Foreign and Commonwealth Affairs ex parte Rees-Mogg* [1994] QB 552 QBD, where the exercise of sovereignty is deemed arranged, rather than limited.
- ⁵⁸ T.R.S. Allan, *Parliamentary Sovereignty: Law, Politics and Revolution* (1997) 113 LQR 443 at 448.
- ⁵⁹ *R v. Ministry of Agriculture, Fisheries and Food, ex p First City Trading Ltd* [1997] 1 CMLR 250; *R v. Customs and Excise Commissioners, ex parte Lunn Poly Ltd and another* [1998] STC 649.
- ⁶⁰ *R v. Ministry of Agriculture, Fisheries and Food and Another, ex parte First City Trading Limited and Others*, [1997] 1 CMLR 250 para. 40 at p. 268.
- ⁶¹ Advocate General Gulmann's opinion in Case C-2/92 *Bostock* [1994] ECR I-955, para. 31.
- ⁶² However in Scotland this was only until the entry into force of the Scotland Act 1998, i.e. July 1999.
- ⁶³ [1995] 2 ALLER 714.
- ⁶⁴ *R v. MAAF, ex parte First City Trading Limited and Others* [1997] 1 CMLR 250.
- ⁶⁵ Before the policy promoted capacity aggregation by allowing transfer of licences.
- ⁶⁶ S. Boyron, "General principles of law and National Courts: Applying a *Jus Commune*?" (1998) 13 ELR 171. at 175.
- ⁶⁷ In Case C-13/94 *P v. Cornwall City Council* [1996] ECR I-2143; the ECJ declared that the principle of equality, was one of the fundamental principles of Community law".
- ⁶⁸ Relied upon as a GPL and through Article 34 (2) EC.
- ⁶⁹ *R v. Ministry of Agriculture, Fisheries and Food, ex p First City Trading Ltd* [1997] 1 CMLR 250 at 267-269.
- ⁷⁰ Para 41.
- ⁷¹ *R v. Customs and Excise Commissioners, ex parte Lunn Poly Ltd and another* [1998] STC 649.
- ⁷² Para 41.
- ⁷³ Schwarze *op. cit.* at 1134-1135.
- ⁷⁴ Case C-2/92 *R. v. MAFF ex parte Bostock* [1994] ECR I-955 and Case C-38/94 *R. v. MAFF ex parte Country Landowners Association* [1995] ECR I-3875.
- ⁷⁵ *Booker Aquaculture Ltd v. the Secretary of State for Scotland* [1999] 1 CMLR 35.
- ⁷⁶ Case C-20/00 *Booker Aquaculture Ltd v. the Secretary of State for Scotland* pending.
- ⁷⁷ S. Boyron *op. cit.* at 178.
- ⁷⁸ J. Shaw in P. Behrens (ed.), *EC Competition Rules in National Courts Part One: United Kingdom and Italy* (Baden-Baden: Nomos, 1992) at pp. 88-90.
- ⁷⁹ *Garden Cottage Foods v. Milk Marketing Board* [1983] 3 WLR 143.
- ⁸⁰ Cases C-6 and 9/90 *Francovich & Bonifaci v. Italian Republic* [1991] ECR I-5357.

